

No. 15,171

IN THE

United States Court of Appeals
For the Ninth Circuit

JESSE FLORES and CARMEN FLORES,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

Jurisdiction is invoked under Sections 1291 and 2255 of Title 28 United States Code. In our opinion no motion was ever made under Section 2255. Appellants have appealed from a motion made under Rule 35 of the Federal Rules of Criminal Procedure to modify the judgment. No constitutional issue was raised in this motion. The motion was apparently not made pursuant to the first sentence of Rule 35, which provides, "The court may correct an illegal sentence at any time," but was directed to the general power of the court to modify a sentence within 60 days of the judgment. We entertain serious doubts as to whether this court has any jurisdiction of this appeal

since the record does not indicate any appeal was taken from the judgment of conviction.

STATEMENT OF THE CASE.

Appellants were indicted on December 21, 1955 for violation of the narcotic laws of the United States. Appellant Jesse Flores was named in the second, third, fourth, fifth, sixth and seventh counts of the indictment, and appellant Carmen Flores was named in the second, fifth, sixth and seventh counts of the indictment. Appellants both admitted one prior conviction of the Federal Narcotic Laws. Appellant Jesse Flores was subject to a penalty, if all counts had run consecutively, of 60 years. Appellant Carmen Flores was subject, if all counts had run consecutively, to a penalty of 40 years. Appellants were convicted on all counts of the indictment. Appellant Jesse Flores received a total sentence of 30 years imprisonment and \$6.00 fine. Counts two and three were ordered to run concurrently. Counts four and five were ordered to run concurrently with each other, and consecutively to counts two and three. Counts six and seven were ordered to run concurrently with each other and consecutively to counts four and five. Appellant Carmen Flores received a total sentence of 20 years. Counts two and five were ordered to run concurrently with each other. Counts six and seven were ordered to run concurrently with each other and consecutively to counts two and five. Judgment was imposed on January 31, 1956. A motion to modify un-

der Rule 35 was made on March 19, 1956. Judge Edward P. Murphy denied the motion on March 26, 1956, as follows:

“This motion to modify judgment, noticed for hearing on March 27, 1956, has been forwarded to me at Honolulu, T.H., where I am on assignment.

“The granting or denial of a motion to modify judgment is within the sound discretion of the Court. I pondered long before the imposition of these lengthy sentences. I am fully cognizant of all the facts and circumstances of this case. The laws against the narcotics traffic must be enforced, if they are to be a real deterrent.

“Accordingly, the motion to modify the judgment as to each defendant is denied.

“Dated: March 26, 1956.

“/s/ Edward P. Murphy

“United States District Judge.”

Notice of appeal from this order was filed on June 4, 1956. Apparently the notice was received by the clerk on May 10, 1956.

ARGUMENT.

Appellants' whole argument is founded on the contention that a sentence of 30 and 20 years for violation of the law against the sale and concealment of narcotic drugs constitutes cruel and unusual punishment. They are apparently under a misapprehension as to the manner in which they were sentenced.

Appellants claim at page one of their brief that they were sentenced to consecutively five year sentences. The record, however, discloses that they received ten year sentences, part of which ran concurrently and part consecutively. Appellants had both previously violated the narcotic laws. Jesse Flores was at one time a professional boxer and, in fact, once fought for the lightweight championship of the world. The court might well have taken into account, in sentencing Mr. Flores, the fact that as a famous athlete he had the power to influence the conduct of hero-worshipping youngsters. The court in considering Mrs. Flores' sentence might well have considered her influence on her husband. In their motion to modify appellants have admitted that Carmen Flores was a user of narcotics long before Jesse Flores. The Appellate Courts have held uniformly that they have no power to interfere with the imposition of sentence if the sentence is within the statutory maximum.

Jackson v. United States, (9th Cir.) 102 F. 473;

Becker v. United States (9th Cir.) 91 F. 2d 550;

United States v. Sorcey, 151 F. 2d 899;

Moore v. Aderhold, 108 F. 2d 729;

Schultz v. Zerbst, 73 F. 2d 668;

Hornbrook v. United States, 216 F. 2d 112;

United States v. Thompson (2d Cir.) 214 F. 2d 545.

In narcotic cases it has been held that even where defendants are charged with separate sections of the

various narcotic laws, involving but one transaction, that consecutive sentences may validly be imposed.

Blockburger v. United States, 284 U.S. 299;
Gargano v. United States (9th Cir.) 140 F. 2d
 118;

Sorrentino v. United States, 163 F. 2d 627;
Bruno v. United States (9th Cir.) 164 F. 2d
 693, cert. denied.

The sentence to be imposed for violation of criminal law is within the discretion of the trial court. That discretion should not be disturbed on appeal.

United States v. Daugherty, 269 U.S. 360;
United States v. Kelley, 186 F. 2d 598, cert.
 denied.

See *Beacham v. United States*, 218 F. 2d 528, where the defendant had no prior record. The crime involved marihuana instead of heroin, as here, and where the court imposed five consecutive five year terms.

This appeal is without merit and should be dismissed, or the order appealed from affirmed.

Dated, San Francisco, California,
 September 17, 1956.

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